No. 91-790

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

CSX TRANSPORTATION, INC.,
Petitioner,
v.
LIZZIE BEATRICE EASTERWOOD,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE ASSOCIATION OF AMERICAN RAILROADS IN SUPPORT OF PETITIONER

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December 18, 1991

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The Association of American Railroads ("AAR") respectfully requests leave to file the attached brief *amicus curiae* in support of the Petition for Certiorari in this case. Petitioner has consented to the filing of the brief. Counsel for Respondent has not consented.

AAR is a non-profit trade association representing the Nation's major railroads. Its members account for approximately 85 percent of the line haulage, employ 90 percent of the workers, and produce approximately 93 percent of the freight revenues of all railroads in the United States. AAR represents its member railroads and appears in an *amicus* capacity before courts, agencies, and the Congress in matters of common interest.

The railroad industry operates a national railroad network. Because their operations are so pervasive and in-

terdependent, AAR members are vitally affected by decisions on federal preemption respecting railroad safety regulations. To a large degree, a balkanized pattern of safety regulation throughout the various states could cripple the industry's viability. As Congress has explicitly recognized, federal preemption is often the only rational method of assuring an efficient and safe national rail system. This is especially true regarding grade crossings which exist everywhere trains operate. Indeed, in calendar year 1989, the Federal Railroad Administration reported that there were 178,627 public grade crossings nationwide. U.S. Dept. of Transportation, Federal Railroad Administration, "Rail-Highway Crossing Accident/Incident and Inventory Bulletin," No. 12, Calendar Year 1989 at p. 45 (June 1990).

AAR files this brief to emphasize the significance of this issue to the railroad industry, and to support Petitioner's position that federal regulations governing rail crossing safety preempt state regulation of the same subject matter.

For the foregoing reasons, the Association of American Railroads respectfully requests that leave to file the attached brief *amicus curiae* in support of the petition for certiorari be granted.

Respectfully submitted,

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Eleventh Circuit, in conflict with the United States Courts of Appeals for the Sixth and Ninth Circuits, erroneously concluded that a regulation promulgated by the Secretary of Transportation did not preempt state tort law relating to railroad safety, merely because the federal regulation was not promulgated pursuant to the Federal Railroad Safety Act.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: Page

TABLE OF AUTHORITIES—Continued

Page

STATUTES AND REGULATIONS:

OTHER:

TABLE OF AUTHORITIES—Continued

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INTEREST OF *AMICUS CURIAE*

The interest of *amicus curiae* is set forth in accompanying Motion For Leave To File Brief *Amicus Curiae*.

INTRODUCTION AND SUMMARY OF ARGUMENT

In the 1970 Federal Railroad Safety Act ("FRSA"), Congress explicitly provided that federal regulations promulgated by the Secretary of Transportation would preempt state regulations relating to railroad safety.[1] 45

[1] The statute does provide for a narrow exception to the preemption provision. Even when the Secretary has adopted regulations covering the subject matter, a state may adopt additional or more stringent regulations when it is "necessary to eliminate or

U.S.C. § 434. This case presents an important and recurring issue that has divided federal circuit courts: whether federal railroad safety regulations promulgated by the Secretary pursuant to statutes other than FRSA preempt state regulations relating to railroad safety on the same subject matter. Because neither the language nor the background of the statute restricts the preemptive power of the Secretary's railroad safety regulations to those promulgated pursuant to FRSA, *amicus* urges this Court to grant certiorari to establish the preemptive authority of all federal regulations relating to railroad safety issued by the Secretary, regardless of the statute pursuant to which the regulation was promulgated.

This case arises from a fatal traffic accident at the Cook Street railroad crossing in Cartersville, Georgia. Respondent's husband, Thomas Easterwood, was killed when his truck collided with a CSX train at a grade crossing. Mr. Easterwood's widow filed an action for wrongful death in the district court, alleging, in part, that CSX had negligently failed to install adequate warning signals at the Cook Street crossing.[2] CSX moved for summary judgment, arguing, among other things, that FRSA precluded a state law negligence action against the railroad based on an allegedly inadequate warning signal at a grade crossing because state regulation of matters relating to railroad safety is preempted when federal regulations are issued on the same subject matter.

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reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce." 45 U.S.C. § 434. This exception is not relevant to this case. *Easterwood v. CSX Transp., Inc.*, 933 F.2d 1548, 1553 n.3 (11th Cir. 1991).

[2] Mrs. Easterwood also alleged negligence in operating the train at unsafe speeds, in failing to level a hump in the road, and in allowing vegetation to grow along the track which interfered with the decedent's vision of the train. Other claims raised in the complaint were dropped before summary judgment. None of these claims is relevant to this proceeding.

Section 434 of 45 U.S.C. provides:

> The Congress declares that laws, rules, regulations, orders and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order or standard covering the subject matter of such State requirement.

CSX noted that the Secretary of Transportation had adopted regulations governing the precise subject matter at issue below, which are codified at 23 C.F.R. Parts 646 and 924, and that these grade crossing regulations preempt the state negligence standard. The district court agreed and granted summary judgment to CSX. *Easterwood v. CSX Transp., Inc.*, 742 F. Supp. 676 (N.D. Ga. 1990). Plaintiff appealed the decision to the United States Court of Appeals for the Eleventh Circuit.

The panel for the Eleventh Circuit discussed at length the preemption provision of the FRSA. *Easterwood v. CSX Transp., Inc.*, 933 F.2d 1548, 1552-53 (11th Cir. 1991). The court noted:

> The legislative history makes clear that because Congress was concerned with the problems created by the hodgepodge of state regulations it explicitly stated that it intended to pre-empt all state regulations covering the same subject matter as the federal regulations. Therefore, our initial task is to examine each claim and determine if any federal regulations have been promulgated which cover the conduct at issue. In such cases, we will find explicit federal pre-emption . . . .

Id. at 1553 (discussing 45 U.S.C. § 434). However, while the court acknowledged that the Secretary *had* issued regulations at 23 C.F.R. Parts 646 and 924 which covered the subject of grade-crossing signals, it held that because those regulations were promulgated pursuant to the Federal Highway Safety Act (23 U.S.C. § 130), rather than pursuant to FRSA, the federal regulations

were not expressly preemptive. Because there was no explicit preemption provision in the Federal Highway Safety Act, and because the court perceived no intent of Congress to occupy the field, the court held that the federal regulations did not preempt the state law of negligence.

REASONS FOR GRANTING THE WRIT

The decision of the Eleventh Circuit in this case conflicts with decisions of the Sixth and Ninth Circuits on the issue of whether federal regulations preempt state standards relating to railroad safety. Given this conflict in the Circuits, this Court should, without more, grant certiorari in this matter. Additionally, the issue raised in the petition for certiorari is an important one as it impacts directly on railroad safety. Congress has explicitly expressed its intent that railroad safety standards must be "nationally uniform to the extent practicable." 45 U.S.C. § 434. The lower court's rule in this case is squarely at odds with this clear congressional command and effectively subverts the congressional goal of a nationally uniform and safe railroad system. Moreover, the issue is a recurring one; trial judges nationwide face efforts to regulate railroad safety through state tort law on a continuing basis and they require the guidance of this Court.

I. THE DECISION OF THE ELEVENTH CIRCUIT IS IN CONFLICT WITH DECISIONS OF THE SIXTH AND NINTH CIRCUITS.

Although the Eleventh Circuit in the decision below recognized the preemptive effect of section 434, it concluded that unless the Secretary promulgates a regulation pursuant to FRSA specifically, that regulation does not have the preemptive effect of section 434 even though it relates to railroad safety. *Easterwood*, 933 F.2d at 1555. Thus, because the federal regulations relating to warning signals and devices at railroad grade crossings were promulgated pursuant to the Federal Highway

Safety Act (23 U.S.C. § 130), the court held that they did not have the express preemptive effect dictated by section 434 of the FRSA.

The panel below recognized that its decision conflicted with the Ninth Circuit's decision in *Marshall v. Burlington Northern, Inc.*, 720 F.2d 1149 (9th Cir. 1983). There, Burlington Northern argued that evidence of the adequacy of the railroad crossing warning devices should not have been admitted at trial because federal regulation on that subject preempted the common law negligence standard. Then-judge (now Justice) Kennedy noted that states were precluded by FRSA from regulating the "same subject matter" already regulated by the Secretary. The *Marshall* court went on to hold that even though the rules relating to railroad grade crossings were promulgated pursuant to the federal Highway Safety Act (23 U.S.C. § 401-404), rather than the FRSA, the Secretary had properly "delegated federal authority to regulate grade crossings to local agencies" and those regulations *would* have the preemptive effect mandated by the FRSA. *Id.* at 1154. Thus, regardless of the statutory authority on which the Secretary relied to promulgate a regulation, that regulation preempts any state regulation on the same subject that relates to railroad safety.

The *Marshall* court did not question the preemptive power of section 434, even for regulations promulgated pursuant to another act. However, a second issue in *Marshall* was the question of when the preemption actually occurs. The Ninth Circuit held that because the Secretary had delegated his authority to local agencies to implement the regulations at each particular grade-crossing, a "federal decision" was not made until the local agency had made a determination with respect to the grade-crossing at issue. Indeed, the district court in the case below followed *Marshall*, and held that although the local agency had originally evaluated the Cook Street crossing and determined to put up gate arms, it later decided to put the funds for the Cook Street project into

other projects. The court held that the local agency had exercised the power delegated to it by the Secretary. "DOT made a decision not to install gate arms at the Cook Street crossing when it transferred the funds to other projects and removed the Cook Street crossing from the list of crossings to receive gate arms." *Easterwood*, 742 F. Supp. at 678.

In reviewing the district court decision, however, the Eleventh Circuit held that even if *Marshall* were correct on the preemptive scope of section 434, preemption would not apply in this case because, contrary to the district court's finding, the local agency had *not* made a decision. The court focused on the "financial constraints and logistical problems" that precluded the upgrade and concluded that because the agency had neither upgraded "nor affirmatively decided that the existing crossing was adequate," the agency had failed to act, and a failure to act is not a decision. *Easterwood*, 933 F.2d at 1555. This finding is not in accordance with *Marshall*, as the district court's more reasoned approach illustrates. Moreover, the question of what the DOT did is one of fact. Given the conflict in evidence, the district court's findings regarding the credibility of the evidence must control. Therefore, this alternative ground for the Eleventh Circuit's decision should not preclude the grant of certiorari.[3]

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[3] *Amicus* contends that both courts are wrong on this question of timing. The statute provides that a state may regulate safety issues "*until such time as the Secretary has adopted* a . . . regulation . . . covering the subject matter of such State requirement." 45 U.S.C. § 434 (emphasis added). The language of the statute controls the scope of the preemption. *See Watt v. Alaska*, 451 U.S. 259, 265-66 (1981). There can be no question that the regulations, which are specifically directed at grade-crossing devices, "cover the subject matter" of state tort law standards on grade crossing devices. Further, the Secretary *adopted* the regulations regarding grade crossings *when they were issued* in the Secretary's name and by his authority. That those regulations delegated some authority to local agencies responsible for highway safety does not mean they

The decision below also conflicts with the Sixth Circuit's decision in *CSX Transp., Inc. v. Public Utilities Comm'n of Ohio*, 901 F.2d 497 (6th Cir. 1990), *cert. denied*, 111 S. Ct. 781 (1991) (hereafter "PUCO"). In *PUCO*, a group of railroads sought a declaratory judgment that regulations issued by the state of Ohio regarding transportation of hazardous materials by rail were invalid because federal regulation on that subject preempted state regulation. The Sixth Circuit held that because the federal regulations regarding transportation of hazardous materials by rail were regulations "relating to railroad safety" which were promulgated by the Secretary, they were preemptive under the FRSA preemption provision. In reaching this holding even though the Secretary of Transportation promulgated the regulations pursuant to the Hazardous Materials Transportation Act, not the FRSA, the Sixth Circuit squarely rejected the conclusion now reached by the Eleventh Circuit. "FRSA preemption relates to *all* rules and regulations regarding railroad safety *promulgated by the Secretary*, whether or not such regulations are promulgated by the FRA through power delegated by the Secretary." *Id.* at 501.

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are not regulations, or that the Secretary has not adopted them. Significantly, there is no provision that the Secretary review the decision of the local agency; the Secretary has no opportunity after delegating the power to "adopt" any decision made by the local agency.

If the Secretary has promulgated or adopted regulations, the fact that those regulations delegate some power to implement those regulations is irrelevant for preemption purposes. Consequently, whether the local agency responsible for the grade crossing at issue has made a "decision" or not in a particular case is legally irrelevant to the determination of whether federal regulations preempt state law on matters relating to railroad safety.

Finally, there is also a conflict among the lower courts on this timing question. Compare *Armijo v. Atchison, Topeka, & Santa Fe Ry Co.*, 754 F. Supp. 1526, 1531 (D.N.M. 1990) (state law preempted "when Secretary passed regulation," rather than when local agency made determination) with *Marshall, supra.*

Moreover, when the defendants in *PUCO* petitioned this Court for a writ of certiorari, this Court requested the United States, which was not a party to the action, to submit a brief *amicus curiae* on the preemption issue. The United States did submit such a brief and took the position urged by *amicus* here, arguing forcefully that although the regulations at issue in that case "were issued under the authority of the HMTA, not FRSA, nothing in the language, structure, or background of either statutory scheme prevents such regulations from serving as the basis for preemption under FRSA's broad preemption provision." Brief for the United States As Amicus Curiae at 6, *Public Utilities Commission of Ohio v. CSX Transportation, Inc.*, On Petition For a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit, No. 90-95, October Term, 1990.[4] Thus, the United States has already taken a position in this Court that strongly undermines the view now taken by the Eleventh Circuit.

Both *Marshall* and *PUCO* conflict with the holding of the Eleventh Circuit in *Easterwood*.[5] Yet only *Marshall* and *PUCO* are consistent with the language of the statute and the legislative history which lies behind it. Under proper preemption analysis, the courts must look first to the language of the explicit preemption provision. As this Court held in *Watt v. Alaska*, 451 U.S. 259, 265-66 (1981), the plain language of a statute is given great weight.

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[4] This Court denied certiorari. 111 S.Ct. 781 (1991).

[5] Indeed, the only known appellate holding in agreement with *Easterwood* is *Karl v. Burlington Northern Railroad Co.*, 880 F.2d 68 (8th Cir. 1989). In *Karl*, however, the court appears to have simply ignored the express preemption provision of 45 U.S.C. § 434. The court concluded that the state tort law standards regarding grade-crossings were not preempted because the federal regulation did not occupy the field and because there was no actual conflict between state and federal law. Given the court's failure to discuss the critical focus of this case—the explicit preemption provision—the decision can be accorded little weight.

The language of the statute in this case provides that a state may continue a rule or standard in effect "until such time as the Secretary has adopted a rule regulation, order, or standard covering the subject matter of such State requirement." 45 U.S.C. § 434. The statute particularly does *not* provide that the state regulations will remain in effect until the Secretary had adopted a rule, regulation, order or standard "pursuant to this chapter" or "pursuant to this subchapter." It is a telling point that Congress did include that limiting language elsewhere in the very same Act when it specifically restricted the scope of other provisions of FRSA to regulations issued under that chapter.[6] The absence of such a limitation in the preemption provision of FRSA indicates that Congress did not desire to so limit the preemption provision. *See General Motors Corp. v. United States*, —— U.S. ——, 110 S. Ct. 2528, 2582 (1990); *Russello v. United States*, 464 U.S. 16, 23 (1983). Thus, both the language and structure of FRSA support the conclusion that Congress intended the preemptive effect of section 434 to extend to *all* laws, rules, regulations, orders, and standards "relating to railroad safety" regardless of whether they are promulgated pursuant to FRSA or not.

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[6] *See, e.g.*, 45 U.S.C. § 435(a) (allowing State participation in investigative and surveillance activities in connection with regulations "prescribed by the Secretary *under this subchapter*") (emphasis added); 45 U.S.C. § 436(a)(1) (authorizing enforcement of civil penalties with respect to violations of "railroad safety rule, regulation, order, or standard issued *under this subchapter*) (emphasis added); 45 U.S.C. § 438 (same); 45 U.S.C. § 437(a) ("The Secretary is further authorized to issue orders directing compliance with this chapter or with any railroad safety rule, regulation, order, or standard *issued under this subchapter.*") (emphasis added); 45 U.S.C. § 437(c) ("All orders, rules, regulations, standards, and requirements in force or prescribed or issued by the Secretary *under this subchapter* . . . shall have the same force and effect as a statute for purposes of [other sections of the title."]) (emphasis added).

Moreover, the extensive legislative history emphasizes what the language of the statute accomplishes: that Congress intended *any* regulation issued by the Secretary, covering the same subject matter as a state regulation relating to railroad safety, to preempt the state law. In drafting and passing FRSA, Congress, increasingly concerned with safety issues relating to railroads, determined that the old, dual system of state and federal regulation of safety issues was inadequate to insure an acceptable level of safety in operations of the nation's railroads. Noting that "[r]ailroad safety is wide in scope and requires a more comprehensive national approach," H.R. Rep. No. 1194, 91st Cong., 2d Sess. 11, *reprinted in* U.S. Code Cong. & Admin. News 4104, 4114 (hereafter "House Report"), Congress expanded the Department of Transportation's authority to regulate to "all areas of railroad safety." *Id.* at 4127.

In addition, Congress restricted the ability of states to regulate issues of railroad safety; indeed, the states are explicitly precluded from regulating those issues when the Secretary has adopted a regulation covering the same subject matter. Congress purposely limited the states' role because it "[d]id not believe that safety in the Nation's railroads would be advanced sufficiently by subjecting the national rail system to a variety of enforcement in 50 different judicial and administrative systems." *Id.* at 4109. *See also, Rayner v. Smirl*, 873 F.2d 60 (4th Cir. 1989) (if state actions were to be allowed where federal regulations already exist, "railroad safety laws might be subject to an unpredictable medley of jury determinations, which Congress in its quest for national uniformity under section 434 sought to avoid"), *cert. denied*, 110 S. Ct. 213 (1990); *National Ass'n of Regulatory Util. Comm'rs v. Coleman*, 542 F.2d 11 (3d Cir. 1976) (Congress' goal of nationally uniform safety regulations can only be achieved through a preemption of state requirements).

Finally, the legislative history indicates specifically that limiting FRSA preemption provision to regulations promulgated pursuant to FRSA alone is inconsistent with Congress' intent in passing FRSA. At the time FRSA was enacted, the Secretary had diverse sources of statutory authority, enacted over many years, to regulate railroad safety issues. Congress recognized these multiple sources of authority and determined not to combine them all (and their accompanying regulations) into FRSA, but rather to leave them extant.[7] Indeed, the House Report indicates that in addition to the pre-existing authority to regulate many railroad safety issues, "the new authority will be implemented with respect to those areas of rail safety not now subject to federal jurisdiction." House Report at 4114. In enacting a categorical preemption provision, without in any way limiting this provision to regulations issued pursuant to FRSA, Congress acted to ensure that the Secretary's multi-statute regulatory authority would achieve uniform safety regulation.

Significantly, in 45 U.S.C. § 433, while directing the Secretary to undertake a comprehensive study of grade crossings,[8] Congress also directed the Secretary, "under the authority provided by this subchapter *and pursuant to his authority over highway, traffic, and motor vehicle safety, and highway construction*," to develop and implement solutions to the grade crossing problem. *Id.* at § 433(b). In fact, that is just what the Secretary did with respect to grade crossings in 23 C.F.R. Parts 646 and 924. As this illustrates, Congress was well aware of the interrelationship between the Secretary's diverse statutory authority when it established a broad preemption

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[7] The Committee report states its intent to "make clear that this grant of jurisdiction does not replace existing rail safety statutes and implementing regulations . . . ." House Report at 4114.

[8] Specifically with respect to grade-crossings, Congress ordered the Secretary to study the national problem of dangerous grade crossings and report back to Congress with recommendations. 45 U.S.C. § 433. In response to those reports, Congress enacted the 1973 changes to the federal Highway Safety Act, amending its provision on grade crossing safety.

provision that makes no differentiation between the Secretary's rail safety regulations based on the particular statute that is the source of the regulations.

Both the language and the history of the statute mandate that the conflict in the circuits must be resolved against the reasoning of the *Easterwood* court. Given Congress' refusal to limit the preemption provision to regulations promulgated pursuant to FRSA, although it so limited other provisions, and Congress' explicit intent to achieve a uniform system of rail safety regulation, this Court should grant certiorari to resolve the conflict and find that the regulations regarding grade crossings preempt state tort law standards regarding grade crossings.

II. THE QUESTION OF FEDERAL PREEMPTION OF RAILROAD SAFETY REGULATIONS IS AN IMPORTANT ONE.

The conflict in the circuits on the question of preemption would, alone, justify plenary review. *See* Supreme Court Rule 10.1(a). Certiorari should also be granted because this case involves an important question of federal law which has not been, but should be settled by this Court. *See* Supreme Court Rule 10.1(c). Although the specific question in this case is whether state regulation of grade-crossing signals and devices is preempted by the federal regulations on that subject, the answer to that question implicates the larger question of whether state rules, regulations, or standards relating to railroad safety are preempted by federal regulations on the same subject which are promulgated by the Secretary of Transportation pursuant to statutes other than FRSA.

This question is an important one for several reasons. First, uniformity of law, while always desirable, assumes increased urgency in cases involving railroads which are part of a national network. The importance of uniformity of regulation with respect to railroads was emphasized by Congress in its deliberations about FRSA:

> With the exception of industrial or plant railroads, the railroad industry has very few local characteristics. Rather, in terms of its operations, it has a truly interstate character, calling for a uniform body of regulation and enforcement. It is a national system. Unlike the gas pipelines, the vast bulk of railroad mileage, and operations thereover, are by companies whose operations extend over many States lines. . . . In addition to the obvious areas of rolling stock and employees, such elements as operating rules, signal systems, power supply systems, and communications systems of a single company normally cross numerous State lines. To subject a carrier to enforcement before a number of different State administrative and judicial systems in several areas of operation could well result in an undue burden on interstate commerce.

House Report at 4110-4111. The same undue burden results from varying decisions regarding preemption which regulate the railroads in varying circuits.

Moreover, the preemption issue as related to railroad safety regulations appears repeatedly through the nation's courts. Since 1986, at least seventeen courts have considered the *specific* question of whether federal regulations regarding grade-crossing signals and devices preempt state common law negligence standards in claims against railroads.[9] Many other courts have considered

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[9] *Easterwood v. CSX Transp., Inc.*, 933 F.2d 1548 (11th Cir. 1991); *Karl v. Burlington Northern R. Co.*, 880 F.2d 68 (8th Cir. 1989); *Marshall v. Burlington Northern R. Co.*, 720 F.2d 1149 (9th Cir. 1983); *Smith v. Norfolk and Western Ry. Co.*, —— F. Supp. ——, 1991 WESTLAW 230174 (N.D. Ind. 1991); *Southern Pacific Transp. Co. v. Maga Trucking Co.*, 758 F. Supp. 608 (D. Nev. 1991); *Hatfield v. Burlington Northern R. Co.*, 757 F. Supp. 1198 (D. Kan. 1991); *Anderson v. Chicago Cent. And Pacific R. Co.*, 771 F. Supp. 227 (N.D. Ill. 1991); *Mahoney v. CSX Transp., Inc.*, No. 4:88-CV-13-HLM (N.D.Ga. Feb. 6, Apr 1990); *Russell v. Southern Railway Co.*, Civ. Act. No. CV289-059 (S.D. Ga. Feb. 14, 1990); *Armijo v. Atchison, Topeka, & Santa Fe Ry. Co.*, 754 F. Supp. 1526

the same preemption issue in the context of other regulations about cabooses, *e.g.*, *Burlington Northern R. Co. v. State of Montana*, 880 F.2d 1104 (9th Cir. 1989), railroad walkways near track structures, *e.g.*, *Missouri Pacific R. Co. v. Railroad Comm'n of Texas*, 833 F.2d 570 (5th Cir. 1987), speed limits, *e.g.*, *CSX Transp., Inc. v. City of Tullahoma, Tenn.*, 705 F. Supp. 385 (E.D. Tenn. 1988), transportation of hazardous materials, *e.g.*, *PUCO*, 901 F.2d 497, railroad accident reporting requirements, *e.g.*, *National Ass'n of Regulatory Utility Comm'rs v. Coleman*, 542 F.2d 11 (3d Cir. 1976), and signs at catenary crossings, *Edwards v. Consolidated Rail Corp.*, 567 F. Supp. 1087 (D.D.C. 1983), *aff'd*, 733 F.2d 966 (D.C. Cir.), *cert. denied*, 469 U.S. 883 (1984). In view of this level of activity, and in view of the fact that in 1990 alone, 4,274 claims and suits involving grade-crossing accidents were brought against railroads, it is essential that this continually recurring issue be resolved. AAR 1990 Report of Claims and Litigation Experience at 2-12.

Finally, this question is important because it implicates questions of undue burden on interstate commerce. In FRSA, Congress expressly indicated that railroads were not to be subject to the regulation of 50 different states because such multiple layers of regulation on an industry that is nationwide by its very nature would prove to be an undue burden on interstate commerce. Moreover, the regulations represent a decision that the responsibility for safety at grade crossings is a governmental one rather than a railroad one. In *Sisk v. National R.R. Passenger Corp.*, 647 F. Supp. 861, 863 (D. Kan. 1986) the court concluded,

> In conjunction with the national regulation of railroad safety, Congress determined that grade crossing improvements were a governmental responsibility rather than the responsibility of the railroads . . . . The significance of the increased funding for railroad crossing improvement under the federal aid program is the government's recognition, in light of its desire to preserve a national railroad transit system, that public safety at crossings is a matter of concern to the government rather than the railroad, and thus requiring the railroads to share in the cost was overly burdensome.[10]

Holding railroads liable for improvements for which the railroads no longer have responsibility is also unduly burdensome, particularly in light of the fact that what is regulated and safe in terms of railroad crossings would be left to the discretion of juries across each state, rather than to those with expertise in the matter—the local highway planning authorities. Such a rule would lead to unpredictability of results, and unforeseeable, expensive burdens on the railroads.

(D.N.M. 1990); *Taylor v. St. Louis Southwestern Ry. Co.*, 746 F. Supp. 50 (D. Kan. 1990); *Nixon v. Burlington Northern R.R.*, No. CV85-384-BLG (1988 WESTLAW 215409) (D. Mont. 1988); *CSX Transp., Inc. v. City of Tullahoma, Tenn.*, 705 F. Supp. 385 (E.D. Tenn. 1988); *Sisk v. National R.R. Passenger Corp.*, 647 F. Supp. 861 (D. Kan. 1986); *Singer v. Southern Ry Co.*, Civ. 88 CVS 3898 (N.C. Sup. Ct. 1989); *Flynn v. Howard*, Civ. 89 CO 21 (Dist. Ct. N.D. 1989); *Southern Railway Co. v. Georgia Kraft Co.*, 188 Ga. App. 623, 373 S.E.2d 774 (1988).

[10] As the court in *Armijo v. Atchison, Topeka & Santa Fe Ry. Co.*, 754 F. Supp. 1526, 1531 (D.N.M. 1990) noted,

> Federal law delegates to the public agency having jurisdictional authority, and not to the railroad, the responsibility for and the authority for determining the need for and the selection of appropriate railroad-highway grade crossing signals.

CONCLUSION

For all the foregoing reasons, as well as those set forth in the Petition for Certiorari, this Court should grant certiorari.

Respectfully submitted,

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